

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1977

No. **77-571**

SHEARN MOODY, JR.,
Petitioner,

VS.

THE STATE OF TEXAS,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS FOR
THE NINTH SUPREME JUDICIAL DISTRICT
OF TEXAS**

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

SHEARN MOODY, JR.,

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VS.

THE STATE OF TEXAS,

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**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS FOR
THE NINTH SUPREME JUDICIAL DISTRICT
OF TEXAS**

TO THE HONORABLE SUPREME COURT OF
THE UNITED STATES:

Petitioner, Shearn Moody, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas,¹ affirming the Order of the Texas Ancillary Receivership Court granting the Ancillary Receiver of Empire Life Insurance Company of America the authority to transfer certain inter-

¹The Texas Supreme Court refused to review the present action by refusing the Petitioner's timely Application for Writ of Error with a no-reversible error notation. Accordingly, this Petition For Certiorari is properly directed to the Court of Civil Appeals. *Michigan-Wisconsin Pipeline Company vs. Calvert, Comptroller of Public Accounts*, 347 U.S. 157 (1954); *Lone Star Gas Company vs. Texas*, 304 U.S. 224 (1938).

pleaded sums to Protective Life Insurance Company of America, pursuant to a Treaty of Assumption and Bulk Reinsurance, as amended by an Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance which Agreement had not been approved by the Ancillary Receivership Court. The Court of Civil Appeals determined that the appeal was well founded but questioned the standing of petitioner to raise the same. Said court acknowledged that the Agreement to Effectuate was not approved by the District Court and that it should have been, but nonetheless, held that there were no "pleading or proof" that the Petitioner was a stockholder of Empire, and, accordingly, held that he lacked standing to attack the failure to approve the Agreement to Effectuate by the District Court.

This case involves an important question as to the constitutional propriety of a finding that although an individual is correct on the merits, that he lacks standing to attack the action of a Receivership Court, where both the undisputed evidence and the documents filed by the Receiver establish beyond doubt that the Petitioner was both a creditor and a stockholder of the company involved in the receivership proceeding, and, therefore, an interested party with standing to attack the action of the receivership court. The denial of standing herein is a shocking denial of due process concerning the issue of standing where the underlying facts establishing that Petitioner was both a shareholder and creditor were freely admitted and never denied by anyone in the District Court.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of the State of Texas affirming the

trial court's order is reported at 539 S.W.2d 354 (Tex.Civ.App.-Beaumont, 1976) and appears in Appendix A. The judgment of the Court of Civil Appeals appears in Appendix B. The Order of the Court of Civil Appeals denying the Petitioner's timely Motion for Rehearing appears in Appendix C. The Order of the Texas Supreme Court refusing the Petitioner's timely Application for a Writ of Error, with a no-reversible error notation, appears in Appendix D and the Order of the Texas Supreme Court overruling the Petitioner's timely Application For Rehearing of the refusal of the Application For the Writ of Error appears in Appendix E.

JURISDICTION

The Court of Civil Appeals affirmed the action of the trial Court on June 10, 1976 and denied the Petitioner's timely Motion for Rehearing on July 8, 1976.

The Texas Supreme Court refused the Petitioner's timely Application For Writ of Error, with a no-reversible error notation, on June 22, 1977. The Texas Supreme Court overruled the Petitioner's timely Motion For Rehearing on July 20, 1977, and this Petition is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3) (1970).

QUESTIONS PRESENTED

1. Whether the Petitioner, Shearn Moody, Jr., was denied the due process of law guaranteed by the Fourteenth Amendment, when the Texas Court of Civil Appeals held that there were no "pleadings or proof" that the Petitioner was a stockholder of Empire Life Insurance Company of America and

accordingly that he lacked standing to attack the Ancillary Receivership Court's failure to approve the Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance, when by both the Ancillary Receiver's own admissions and the undisputed evidence in the record before it, the Petitioner was both a creditor and a stockholder of Empire Life Insurance Company of America.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

The parties below were Shearn Moody, Jr., ("Moody"), President, Chairman of the Board, the principal stockholder of Empire Life Insurance Company of America ("Empire") and the Petitioner herein; Protective Life Insurance Company ("Protective"), an intervenor herein; and Herbert Crook, Statutory Insurance Liquidator of the State of Texas and Ancillary Receiver of Empire.

In the Domiciliary receivership proceeding pending against Empire in Alabama on June 14, 1974 the Domiciliary Receivership Court authorized the Domiciliary Receiver to liquidate Empire, and to enter into a Treaty of Assumption and Bulk

Reinsurance with Protective. On February 26, 1975, the Texas Ancillary Receivership Court authorized the Texas Ancillary Receiver to consummate the same treaty. Subsequently, on or about April 11, 1975, the Domiciliary Receiver, the Ancillary Receiver and Protective entered into an Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance (Appendix I), which Agreement significantly modified the Treaty of Assumption and Bulk Reinsurance approved by the Domiciliary and Ancillary Receivership Courts. The Domiciliary Receiver applied for and obtained the permission of the Domiciliary Receivership Court to execute the Agreement to Effectuate. Yet, the Texas Ancillary Receiver did not and failed to make any attempt to secure the prior approval of the Texas Ancillary Receivership Court before executing said Agreement to Effectuate.

In February of 1974, the Petitioner had instituted an action in the 122nd Judicial District Court of Galveston, Texas, seeking a declaration to the effect that the two/fifths (2/5ths) of a one/eighth (1/8th) life estate income interest in the Libbie Shearn Moody Trust ("the Trust") assigned by him to Empire could not be reassigned without the prior consent of either the Trustee or the Petitioner. On November 27, 1974, the Galveston court granted the Motion For Summary Judgment filed by the Ancillary Receiver, on behalf of Empire, declaring the trust interest to be freely assignable by Empire without the prior consent of either the Petitioner or the Trustee. The action of the Galveston court was affirmed by the Court of Civil Appeals for the Fourteenth Supreme Judicial District of the State of Texas, and the Texas Supreme Court rejected the Petitioner's timely Application For Writ of Error with a no-reversible

error notation. *Moody v. The Moody National Bank of Galveston, et al*, 522 S.W.2d 710 (Tex.Civ.App.-Houston [14th] 1975, writ ref'd n.r.e.).

While the Galveston proceeding was pending, the Trustee on January 17, 1975, filed a Stakeholder's Petition In Intervention in the Texas Ancillary Receivership Court declaring that it held in its possession certain net income distributions which were to be paid to the lawful owner of the two/fifths (2/5ths) of a one/eighth (1/8th) life estate interest which the Petitioner had previously assigned to Empire. The Texas Ancillary Receiver and Protective, as Intervenor, filed a Joint Motion For Summary Judgment with regard to the right to the funds interpleaded by the Trustee on the grounds that the Receiver was entitled to such funds as a matter of law and was authorized to transfer them to Protective by virtue of the Reinsurance Agreement. The Ancillary Receiver and Protective prayed that the interpleaded sums be paid to the Ancillary Receiver for transmission to Protective in accordance with the Treaty of Assumption and Bulk Reinsurance approved by the Ancillary Receivership Court.

Petitioner Moody, a Defendant in the Ancillary Receivership proceeding, filed an Opposition to the Ancillary Receiver's and Protective's Joint Motion For Summary Judgment and asserted in part, that the payment of funds for transmission to Protective would not be made pursuant to the Reinsurance Agreement which had been approved by the Ancillary Receivership Court, since that Reinsurance Agreement had subsequently been modified by an "Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance", which modification had not been approved by the Ancillary Receivership Court. The

Petitioner also pointed out that he had received no notice of any motion by the Ancillary Receiver for approval by the Ancillary Receivership Court of the aforementioned Agreement to Effectuate. In support of his Opposition to the Motion For Summary Judgment, the Petitioner attached to his response, the affidavit of Frank G. Newman, his counsel in the proceeding, who asserted that: "I, as an attorney for Defendant, Moody, have received no notice of any motion by Mr. Herbert Crook, Ancillary Receiver for Empire Life Insurance Company of America, for approval by this Honorable Court of the aforementioned 'Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance'." (Appendix H).

As pointed out by Petitioner Moody in his Opposition the Agreement to Effectuate significantly modified the terms of the Treaty approved by the Court, and increased the moratorium imposed upon the cash benefits available under Empire's policies from thirty-five per cent (35%) to fifty per cent (50%), thereby effecting a significant deprivation of the property rights of Empire's policyholders. On November 4, 1975, the trial court nonetheless granted the Joint Motion For Summary Judgment filed by the Ancillary Receiver and Protective.

In affirming the judgment of the trial court, the Court of Civil Appeals expressly found that the Agreement to Effectuate had not been approved by the trial court (Appendix A). The Court of Civil Appeals accepted the Petitioner's argument on the merits and held that the Agreement to Effectuate should have been approved by the Ancillary Receivership Court. Yet the Court of Civil Appeals indicated that it found "no pleadings or proof" that the Petitioner was a stockholder of Empire and accordingly held that the Petitioner lacked standing to

attack the trial court's failure to approve the Agreement to Effectuate. The Petitioner attacked the erroneous finding of the Court of Civil Appeals in his timely Motion for Rehearing and in his timely Application for Writ of Error filed in the Texas Supreme Court.

The Court of Civil Appeals overruled the Motion for Rehearing and the Texas Supreme Court refused the Petitioner's timely Application For Writ of Error with a no-reversible error notation and overruled his timely Application For Rehearing regarding the refusal of the Application for Writ of Error.

REASONS FOR GRANTING THE WRIT

I.

THE TEXAS COURT OF CIVIL APPEALS DENIED PETITIONER SHEARN MOODY, JR. THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN IT HELD THAT THERE WERE "NO PLEADINGS OR PROOF" THAT HE WAS A STOCKHOLDER OF EMPIRE LIFE INSURANCE COMPANY OF AMERICA SINCE BOTH THE UNDISPUTED EVIDENCE AND THE ANCILLARY RECEIVER'S OWN ADMISSIONS ESTABLISHED THAT THE PETITIONER WAS A STOCKHOLDER OF EMPIRE.

The Court of Civil Appeals held that the execution of the Agreement to Effectuate was more than perfunctory and that the Ancillary Receiver should have submitted the same to the Ancillary receivership court for approval. (Appendix A). However, the Court of Civil Appeals affirmed the summary judgment below holding that there were no "pleadings or proof" that the Petitioner was a stockholder of Empire.

The Court of Civil Appeal's finding that there were "no pleadings or proof" that Petitioner Moody is a stockholder of Empire is completely contrary to the summary judgment evidence adduced by the Petitioner in opposition to the Ancillary Receiver's and Protective's Joint Motion for Summary Judgment. In the Affidavit of Shearn Moody, Jr., attached as Exhibit "D" to his Opposition to Motion for Summary Judgment, Moody repeatedly describes himself as a shareholder of Empire (Appendix F). Moody recites that at the time he assigned two/fifths (2/5ths) of his one/eighth (1/8th) life estate interest in the income of Libbie Shearn Moody Trust to Empire, he was "the beneficial owner of all the outstanding shares of stock of Empire Life Insurance Company of America." Moody also indicates in his Affidavit that the series of mergers and acquisitions which were effected by Empire could not have occurred without his consent as the controlling shareholder of Empire.

The Affidavit of Dale R. Major, the attorney who prepared Moody's assignment of the trust interest in the Libbie Shearn Moody Trust to Empire and who was also at that time Vice-President and Treasurer of Empire, was also attached as Exhibit "E" to Moody's Response to Motion for Summary Judgment (Appendix G). In his affidavit, Major asserts that: "At the time of the assignment of Shearn Moody, Jr. he was the owner of all of the outstanding shares of stock of Empire Life Insurance Company (now known as Empire Life Insurance Company of America)."

The Affidavit of Shearn Moody, Jr. and the Affidavit of Dale R. Major are made on personal knowledge and show affirmatively that the affiants are competent to testify to the

matters stated therein. These affidavits were clearly sufficient summary judgment proof under Texas law that Shearn Moody, Jr., is a shareholder of Empire. TEX. R. CIV. P. 166-A(e).

The Petitioner would also point out that under Texas law, an appellate court reviewing the correctness of the rendition of a summary judgment by a trial court must accept as true all the evidence of the party opposing the motion which tends to support such party's contention, and *give him the benefit of every reasonable inference which can properly be drawn in favor of his position*. *Gulbenkian v. Penn.*, 151 Tex. 412, 252 S.W.2d 929 (1952). All conflicts in the evidence are disregarded, and the evidence which tends to support the position of the party opposing the motion is accepted as true. *Farley v. Prudential Insurance Company*, 480 S.W.2d 176 (Tex. 1972); *Parrott v. Garcia*, 436 S.W.2d 897 (Tex. 1969); *Great American Reserve Insurance Company v. San Antonio Plumbing Supply Company*, 391 S.W.2d 41 (Tex. 1965).

Indeed, under Texas law, where the movant fails to controvert the opponent's summary judgment evidence, such evidence must be accepted as true on appeal. *Railroad Commission v. Sample*, 405 S.W.2d 338 (Tex. 1966); *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972). The Ancillary Receiver and Protective did not controvert Moody's assertion that he is in fact a shareholder of Empire, and thus such statement as contained in the Affidavit of Shearn Moody, Jr., as well as in the Affidavit of Dale R. Major was probative evidence of his status as a shareholder as a matter of Texas law.

Indeed, Moody's interest in the proceeding as a stockholder of Empire was admitted by the Ancillary Receiver in plead-

ings filed in the trial court and in the Court of Civil Appeals. In his Brief, the Ancillary Receiver asserted that: "Moody's sole interest in the receivership proceedings is that of a former stockholder of Empire." (Receiver's Brief p. 14). Even the Alabama Supreme Court in *Moody v. State of Alabama*, 329 So.2d 73 (1976), whose opinion the Ancillary Receiver attached to his Brief as Exhibit "A", expressly found Moody to be "... President, Chairman of the Board, and principal stockholder of Empire." (Receiver's Brief, Exhibit "A" p. 3).

In the proceeding before the trial court below, the Ancillary Receiver attached several exhibits to his sworn Motion for Summary Judgment describing Shearn Moody, Jr., as a shareholder of Empire and thus, in effect, admitted that Moody is in fact a shareholder of Empire. Exhibit "I" to the Ancillary Receiver's sworn Motion for Summary Judgment was a copy of the opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas in *Moody v. The Moody National Bank of Galveston, et al*, 522 S.W.2d 710, (Tex.Civ.App.-Houston [14th] 1975, writ ref'd n.r.e.) in which Moody is described as a shareholder of Empire. Exhibit "K" to the Receiver's motion is a copy of the notice of annual meeting of shareholders for Empire dated June 14, 1965 (T. 130, 131). Moody is consistently described throughout said notice as major shareholder of Empire: "Voting Rights and Vote Required" (T. 132); "Ownership of Shares (control)" (T. 137); "Financial Statements and Notes" (T. 138-90); "Management" (T. 150).

Both the Answer of Defendant Shearn Moody, Jr., to the Stakeholder's Petition in Intervention (T. 16) and Moody's

Plea in Abatement (T. 218) describe Shearn Moody, Jr. as a shareholder of Empire. Given the Ancillary Receiver's direct admission that Moody has an interest in this proceeding as a shareholder of Empire as well as the affidavit filed by Moody in Opposition to the Ancillary Receiver and Protective's Joint Motion for Summary Judgment, it is clear that the Court of Civil Appeal's holding that there were "no pleadings or proof" that Shearn Moody, Jr., is a shareholder of Empire was contrary to the undisputed evidence in the record and so grossly erroneous as to be tantamount to a denial of the due process of law guaranteed by the Fourteenth Amendment.

"The protection of the individual from arbitrary action is the very essence of due process of law." *Slochower v. Board of Higher Education of New York City*, 76 S.Ct. 637, 350 U.S. 551 (1956).

As to the Petitioner's status as a creditor of Empire the Court of Civil Appeals acknowledged that Moody had received a \$221,000 debenture as consideration for his Transfer of the Trust interest to Empire (See Appendix A). In the Petitioner's Affidavit, he indicated that the debenture had *not* been paid by Empire. (See Appendix F).

As a stockholder and creditor of Empire and as a Defendant in the ancillary receivership proceeding, Petitioner Moody clearly had a justiciable interest in the ancillary receivership proceeding as a matter of Texas law and clearly had standing to challenge the court's failure to approve the Agreement to Effectuate. *Shaw v. Strong*, 128 Tex. 65, 96 S.W.2d 276 (1936), *Security Trust Company of Austin v. Lipscomb County*, 142 Tex. 572, 180 S.W.2d 15 (1933).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that his Petition for a Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas be granted.

Respectfully submitted,
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ATTORNEYS FOR PETITIONER,
SHEARN MOODY, JR.

PROOF OF SERVICE

Proof of service of three copies of Petitioner's Petition for a Writ of Certiorari upon each of the parties separately represented by counsel was filed by FRANK G. NEWMAN, a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the petitions were filed.

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APPENDIX A

NO. 7830

SHEARN MOODY, JR.

Appellant,

V.

STATE OF TEXAS

Appellee.

In 1963, appellant Shearn Moody, Jr., transferred and assigned to Empire Life Insurance Company, an Alabama company, an undivided two-fifths interest of his undivided one-eighth life interest in the income from a trust created by Libbie Shearn Moody. He received therefor a debenture in the amount of \$221,000. Empire became insolvent, and in June 1972 the Circuit Court for the Tenth Judicial Circuit of Alabama placed it in receivership. The domiciliary receiver (John G. Bookout, Commissioner of Insurance of Alabama) was in Alabama since Empire was an Alabama corporation. Because of the trust above alluded to, an ancillary receivership was instituted in Texas.

A reinsurance agreement (termed in Alabama "Protective Treaty") was effected wherein the Empire receiver agreed to transfer to Protective Life Insurance Company of America (Birmingham, Alabama) all of Empire's assets (except \$2,000,000 retained for expenses) including the trust assignment. Thereafter, appellant Shearn Moody, Jr., as plaintiff sought declaratory relief that Empire had no right to transfer or assign the trust to Protective under the treaty or reinsurance agreement. His contention was rejected. *Moody v. Moody National Bank of Galveston*, 522 S.W.2d 710 (Tex. Civ. App. — Houston [14th Dist.] 1975, writ ref'd n.r.e.).

The Protective treaty or reinsurance agreement, which was approved by the courts, placed a limited moratorium on the payment of cash values under the Empire policies at thirty-five percent, meaning the policyholders could initially withdraw only sixty-five percent of the cash values built up under their policies. Thereafter the receiver, the Texas ancillary receiver, and Protective in an agreement entitled "Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance" agreed to increase the moratorium by fifteen percent. This agreement has not been approved by the Texas court. The case we review is a contention by Shearn Moody, Jr., that the failure to obtain court approval of this last agreement (the fifteen percent increase) makes it invalid. The trial court granted Empire's ancillary receiver a summary judgment, from which Moody perfects this appeal.

Under the Texas Insurance Code, the same rights, duties, and liabilities apply to an ancillary receiver as well as a domiciliary receiver. TEX. INS. CODE ANN. art. 21.28 § 13 (1963).

Sec. 2(e) of TEX. INS. CODE ANN. art. 21.28 (1963) directs the receiver to conduct the business of the company "subject to the direction of the court." We believe that the fifteen percent moratorium increase is not perfunctory and should be approved by the Travis County District Court. However, it is undisputed that appellant is not a policyholder of Empire. We find no pleadings or proof that he is a stockholder. Therefore, we hold he has no standing in court to make this contention and affirm the summary judgment. For a person to maintain an action in court, it must be shown that he has a justiciable interest in the subject matter in litigation,

either in his own right or in a representative capacity. See authorities in 44 TEX. JUR. 2d *Parties* § 7 at 145 (1963). See also *Dean v. Maxwell*, 173 S.W.2d 246 (Tex. Civ App. — Eastland 1943, no writ).

AFFIRMED.

Martin Dies, Jr.
Chief Justice

Opinion delivered
June 10, 1976

Justice Stephenson not participating.

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APPENDIX B

COURT OF CIVIL APPEALS
Ninth Supreme Judicial District
Beaumont, Texas
77701

Martin Dies, Jr.
Chief Justice
Homer E. Stephenson
Associate Justice
Quentin Keith
Associate Justice

J. A. Hulgan
Clerk

Judgment rendered June 10th, 1976
Shearn Moody, Jr.
vs No. 7830
State of Texas

Appealed from the District Court of Travis County, Texas
Opinion by Chief Justice Martin Dies, Jr.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was no-error in the judgment, it is, therefore, considered, adjudged and ordered, that the judgment of the court below be in all things affirmed.

All cost of this proceedings are assessed against the appellant, Shearn Moody, Jr., and the sureties on his appeal bond, Aetna Casualty and Surety Company. A certified copy of this judgment shall be certified below for observation.
A true copy of the judgment, to be entered, I certify.

Joe A. Hulgan, Clerk

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APPENDIX C

COURT OF CIVIL APPEALS
Ninth Supreme Judicial District
Beaumont, Texas
77701

July 8th, 1976

Martin Dies, Jr.
Chief Justice
Homer E. Stephenson
Associate Justice
Quentin Keith
Associate Justice

J. A. Hulgan
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RE: No. 7830 Shearn Moody, Jr. vs State of Texas

Gentlemen:

Appellant's Motion for leave to file amended Motion for rehearing, granted.

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Appellant's Amended Motion for rehearing is overruled,
this the 8th day of July, 1976.

Very truly yours,

Joe A. Hulgán, Clerk

A-7

**APPENDIX D
IN THE SUPREME COURT OF TEXAS**

June 22, 1977

No. B-6227

SHEARN MOODY, JR.

vs.

THE STATE OF TEXAS

} From TRAVIS County,
NINTH District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused. (Justice Yarbrough not sitting)

It is further ordered that applicant, Shearn Moody, Jr., and his surety, Aetna Casualty and Surety Company, pay all costs incurred on this application.

**APPENDIX E
IN THE SUPREME COURT OF TEXAS**

No. B-6227

July 20, 1977

SHEARN MOODY, JR.

vs.

THE STATE OF TEXAS

} From TRAVIS County,
NINTH District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled. (Justice Yarbrough not sitting)

APPENDIX F**NO. 198,374**

THE STATE OF TEXAS	}	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 53RD JUDICIAL DISTRICT
VS.		
EMPIRE LIFE INSURANCE		
COMPANY OF AMERICA,		
ET AL		

AFFIDAVIT OF SHEARN MOODY, JR.

STATE OF TEXAS
COUNTY OF GALVESTON

BEFORE ME, the undersigned notary public in and for said county and state on this 23 day of July, 1975 personally appeared Shearn Moody, Jr. known to me to be a credible person, who on oath did depose and say the following:

I am Shearn Moody, Jr. I am over twenty-one years of age and I have personal knowledge of the matters stated in this, my affidavit. I am a resident of Galveston County, Texas.

I am one of the beneficiaries of a trust established by the Will of my grandmother, the late Libbie Shearn Moody. I have read the answer of Defendant, Shearn Moody, Jr., to Stakeholder's Petition and Intervention and all of the allegations of facts therein and in the First Amended Petition attached thereto are true and correct.

I caused Empire Life Insurance Company of America to be incorporated under the laws of the State of Alabama on or

Exhibit "D"

about June 27, 1963 and purchased all of its initially outstanding shares of stock.

On or about July 3, 1963, I executed a written assignment to Empire Life Insurance Company of America, a copy of which is annexed to the answer of Defendant, Shearn Moody, Jr. to Stakeholder's Petition and Intervention. At the time of said assignment I was the beneficial owner of all of the outstanding shares of stock of Empire Life Insurance Company of America.

At the time I executed the said assignment to Empire Life Insurance Company of America it was my intent to make an assignment to it of the interest in the Libbie Shearn Moody Trust described therein upon terms and conditions whereby the said Empire Life Insurance Company of America could collect, receive and receipt for, during my lifetime, two-fifths of the money I was to have received from the Libbie Shearn Moody Trust, a trust created by the aforementioned Will, but without the right of Empire Life Insurance Company of America to reassign or retransfer said right to any other party whomsoever, unless I agreed to such reassignment and the Trustee consented to it.

I understood at the time that the Will of Libbie Shearn Moody contained a spendthrift trust clause in Section IV, paragraph 10, which prohibited an assignment by the beneficiaries of the Trust. It was my understanding and intent at the time that this prohibition did not affect an assignment by me to a corporation of which I owned all of the outstanding stock at the time and that such corporation would simply have the right to receive, receipt and collect monies, but not the right to reassign the interest without my approval, or without the consent of the Trustee.

I did not intend to assign to Empire Life Insurance Company of America interests or rights which it could reassign or retransfer, unless I agreed to such reassignment or retransfer and the Trustee of the Trust consented to it. It was my understanding at the time of the assignment that it did not breach or violate the terms of the spendthrift trust clause of my grandmother's Will because I owned all of the stock of Empire Life Insurance Company of America and that it would simply receive, collect and receipt for income, subject to the consent of the Trustee.

The assignment to Empire Life Insurance Company of America did not contain words to the effect that the assignment was being made to it, its successors and assigns, for the very reason that it was not intended, contemplated, or agreed at the time that Empire Life Insurance Company of America would have the right to make any such reassignment or retransfer of such interest of the said Libbie Shearn Moody Trust without my approval and the consent of the Trustee.

Under the terms of the assignment which I executed in favor of Empire Life Insurance Company of America, I intended to convey to it the right to receive, collect and receipt for two-fifths of the monies otherwise payable to me under the Libbie Shearn Moody Trust; subject to the consent of the Trustee, but without the right or power of Empire Life Insurance Company of America to sell, transfer, or convey such right to any other party whomsoever, unless I agreed to such assignment and the Trustee consented to it.

The only consideration I received from Empire Life Insurance Company of America for the said assignment was a debenture from it in the principal amount of \$221,000.00 with

interest at three (3%) percent per annum and no part of the principal or interest of the debenture has ever been paid to me. The interest which was the subject of the assignment was worth much more than the amount of the said debenture and the amount of the debenture was arrived at by determining the estimated S.M. tax basis for inheritance tax purposes of Libbie Shearn Moody in the interest assigned by me.

Empire Life Insurance Company of America subsequently issued additional shares of stock to other shareholders as a result of mergers of other insurance companies into it and its acquisition of the insurance business of other insurance companies. However, I would not have consented to the issuance by Empire Life Insurance Company of America of shares of its stock to other shareholders, except upon a valuation of the interest of Empire Life Insurance Company of America in the Libbie Shearn Moody Trust in an amount which fairly reflected its value, which amount was \$14,213,440 as of 1965, and which was the value assigned to said interest on the books of Empire Life Insurance Company of America as of December 31, 1965 and which valuation was approved by the Insurance Departments of Alabama, Texas and Arkansas in an examination by them of Empire Life Insurance Company of America as of the last mentioned date.

As stated in Plaintiff's First Amended Petition in the above cause the said value was reduced by the Insurance Commissioner of Alabama to \$4,200,000 at a subsequent date and a valuation at that amount made Empire Life Insurance Company of America appear to be insolvent. I believe that such reduction in value was wrongful and did not fairly reflect the value of said

interest and that it was so made in an attempt to unlawfully deprive me of a part of my rights and bequests under my grandmother's Will.

When Empire Life Insurance Company of America brought in outside shareholders through mergers and acquisitions by it of the insurance business and assets of other insurance companies for stock the various insurance departments of the states where Empire Life Insurance Company of America was licensed to do business (including Alabama and Texas) approved the valuation of \$14,203,440 for two-fifths of my one-eighth interest in the Libbie Shearn Moody Trust. This approval was given by approving proxy statements containing financial statements which assigned such value to such interest and I would not have consented to such mergers and acquisitions except upon a rate of exchange of Empire Life Insurance Company of America shares based upon such valuation and those mergers would not have occurred if I as the principal stockholder had not consented.

In 1972 the Insurance Commissioner of Alabama attempted to decrease such valuation by approximately \$10,000,000 which would have the effect, if upheld, of making Empire Life Insurance Company of America insolvent and based upon such reduction in value the Insurance Commissioner of Alabama, as receiver of Empire Life Insurance Company of America, has sought approval in the 10th Circuit Court of Alabama for the transfer by him to Protective Life Insurance Company of Birmingham, Alabama of substantially all of the assets of Empire Life Insurance Company of America, including the interest left to me by my grandmother in the spendthrift trust created by her Will. I have appealed the decision of the 10th Circuit Court

of Alabama to the Supreme Court of Alabama and expect to prove that such decrease in valuation was wrongful; that Empire Life Insurance Company of America is solvent; that the reinsurance agreement with Protective Life Insurance Company is not valid and lawful. It was never my intent to authorize any receiver or successor of Empire Life Insurance Company of America to transfer my interest in my grandmother's spendthrift trust.

At the time the assignment was made from me to Empire Life Insurance Company of America, Dale Major was the attorney who prepared the assignment. He advised me that the effect of the assignment, in the form prepared by him, was to entitle Empire Life Insurance Company of America to receive two-fifths of the money I would otherwise receive from the Libbie Shearn Moody Trust, but without the right or power of Empire Life Insurance Company of America to sell or transfer such monies to another unless I agreed to or joined in the assignment and the Trustee consented to said assignment. He said that this was the reason why the assignment was not made to the successors and assigns of Empire. I relied upon this advice in executing the assignment and believed it to be true and would not have executed it if I had known or understood that the legal effect thereof would be to entitle Empire Life Insurance Company of America to sell or reassign such interest to another party, without any agreement from me and without any consent of the Trustee.

I have seen the motion of defendant, Empire Life Insurance Company of America for a summary judgment in this cause and the exhibits attached thereto. Neither by such exhibits nor by any other writing have I ever intended to take the position

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or say that Empire Life Insurance Company of America had the right to assign or transfer to another any interest in the Libbie Shearn Moody Trust assigned to it by me, in the absence of my agreement thereto and the consent thereto of the Trustee of the Trust. I understood and believed that it did have the right to make any such assignment; provided that I, as a named beneficiary under the Will of Libbie Shearn Moody, agreed to or joined in the assignment and the Trustee, under the Trust, consented to such assignment.

I have not agreed or consented to an assignment by Empire Life Insurance Company of America or its receiver of any interest in the Libbie Shearn Moody Trust, nor have I ever made an assignment to the successors or assigns of Empire Life Insurance Company of America.

SHEARN MOODY, JR.

SUBSCRIBED AND SWORN to before me the day and year first above mentioned.

Notary Public in and for
Galveston County, Texas

My Commission Expires: June 1, 1977

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**APPENDIX G
NO. 198,374**

THE STATE OF TEXAS	}	IN THE DISTRICT COURT
VS.		OF TRAVIS COUNTY,
EMPIRE LIFE INSURANCE		TEXAS
COMPANY OF AMERICA,		53RD DISTRICT
ET AL		

AFFIDAVIT OF DALE R. MAJOR

STATE OF TEXAS
COUNTY OF GALVESTON

BEFORE ME, the undersigned notary public in and for said county and state on this 23rd day of July, 1975, personally appeared Dale R. Major known to me to be a credible person, who on oath did depose and say the following:

I am Dale R. Major. I am over twenty-one years of age and have personal knowledge of the matters stated in this, my affidavit. I am a resident of Houston, Harris County, Texas. I am an attorney at law and am licensed to practice law in the State of Texas and have been at all times material hereto or referred to herein. I prepared a certain assignment dated July 3, 1963, from Shearn Moody, Jr. to Empire Life Insurance Company, by the terms of which a certain interest in the Libbie Shearn Moody Trust was assigned to Empire Life Insurance Company.

At the time of such assignment, I was also Vice-President and Treasurer of Empire Life Insurance Company.

In the preparation of such assignment it was my intent as

EXHIBIT "E"

the scrivener of such document to prepare an instrument which would enable Empire Life Insurance Company to receive two-fifths of the money which would otherwise be payable to Shearn Moody, Jr. under the Libbie Shearn Moody Trust, a trust created by the Will of the late Libbie Shearn Moody. However, it was not my intent as scrivener of the instrument for it to have the legal effect that Empire Life Insurance Company would have the power to reassign such interest, nor that such interest would inure to the benefit of the successors or assigns of Empire Life Insurance Company. I attempted to prepare the instrument in accordance with that intent which also was the intent and understanding and agreement of Shearn Moody, Jr. and Empire Life Insurance Company at that time.

Paragraph IV, Section 10 of the Will which created the Trust prohibited an assignment by a beneficiary of the Trust, but, provided that a beneficiary could appoint an agent or attorney in fact to receive, collect or receipt for any principal or income with the consent of the Trustee.

It was my intent and understanding at the time, as the scrivener of the instrument and as an officer of Empire Life Insurance Company, that upon the execution of the assignment by Shearn Moody, Jr. and the consent thereto by the Moody National Bank, as Trustee of the Libbie Shearn Moody Trust, that this would effectively permit Empire Life Insurance Company in the place and stead of Shearn Moody, Jr., to receive, collect, and receipt for income under the Trust, but that Empire Life Insurance Company would not have any greater right thereto, nor any right to assign such income to another.

The name of Empire Life Insurance Company was subse-

quently changed to Empire Life Insurance Company of America and it has been a party to several mergers. I was an officer, director and/or attorney for Empire Life Insurance Company of America at the time of each such merger. In each such merger Empire Life Insurance Company of America was the surviving corporation and it has never assigned the aforementioned interest in the Libbie Shearn Moody Trust.

A copy of the assignment is attached hereto, marked Exhibit "A". It refers not only to Empire Life Insurance Company, an Alabama Corporation, but also to Empire State Life Insurance Company, a Texas corporation. Empire State Life Insurance Company was then a Texas corporation owned by Shearn Moody, Jr.

As a practicing attorney, I have drawn many assignments, deeds, bills of sale and other conveyances. Whenever it was the intent and understanding of the grantor in such instruments that the grantee be vested with the right to reassign, or that the interest conveyed inured to the benefit of the grantee's assignees or successors, I have always added a habendum to the instrument after the granting portion of the instrument, defining the extent of the ownership and reading, substantially as follows:

"To have and to hold, unto the said grantee, its successors and assigns, forever."

It was my understanding and intention by omitting such language from the assignment from Shearn Moody, Jr. to Empire Life Insurance Company that the subject of the assignment would vest only in Empire Life Insurance Company and not in its successors or assigns.

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At the time I prepared the said assignment I advised Shearn Moody, Jr., as his attorney, that such assignment was only to Empire Life Insurance Company and that it had been so prepared that Empire Life Insurance Company could not reassign such interest to another unless he joined in and approved such reassignment and unless The Moody National Bank consent to it.

No consideration was paid to Shearn Moody, Jr. by Empire Life Insurance Company for the said assignment, except that it did give him a debenture payable only out of the surplus of such company in the principal amount of \$221,000.00 with interest at 3% and no part of the principal or interest have been paid. At the time of the assignment by Shearn Moody, Jr. he was the owner of all of the outstanding shares of stock of Empire Life Insurance Company (now known as Empire Life Insurance Company of America).

If the assignment does legally have the effect of conveying an interest to Empire Life Insurance Company alone and with the right to reassign or reconvey such interest, then it is mistaken and erroneous and does not reflect the intent and understanding of the parties at the time it was executed. At the time of the assignment, Shearn Moody, Jr. owned all of the stock of Empire State Life Insurance Company, a corporation then organized and existing under the laws of the State of Texas.

For the past twenty-five years I have specialized in title insurance matters and during most of that time I have owned a title insurance company. It is my opinion that the assignment from Shearn Moody, Jr. to Empire Life Insurance Company conveys an interest which does not inure to the benefit of its successors or assigns, and that such interest may not be

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reassigned by Empire Life Insurance Company without the written agreement of Shearn Moody, Jr. and the written consent of The Moody National Bank, as Trustee, of the Libbie Shearn Moody Trust.

DALE R. MAJOR

SUBSCRIBED AND SWORN TO BEFORE ME the day and year first above mentioned.

Notary Public in and for
Galveston County, Texas

My Commission Expires: June 1, 1977

[Exhibit "A" Omitted]

APPENDIX H

THE STATE OF TEXAS
COUNTY OF DALLAS

AFFIDAVIT

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, personally appeared Frank G. Newman, who on oath did depose and say as follows: I am an Attorney for Shearn Moody, Jr., a Defendant in the above action. I am fully competent to testify and have personal knowledge as to all the matters stated herein.

During the hearing before this Honorable Court upon the application of Mr. Herbert Crook, Ancillary Receiver for Empire Life Insurance Company of America, for Authority to Consummate a Reinsurance Agreement with Protective Life Insurance Company, the Attorney for Protective Life Insurance Company represented to this Court that the March 1, 1975 deadline for the effective date of the Reinsurance Agreement was then imminent and that it would not be extended. After considering the pleadings, exhibits and arguments of counsel, this Honorable Court signed a judgment on February 26, 1975, ordering that the said Application was approved.

Two days later, on February 28, 1975, Protective Life Insurance Company extended the deadline for the effective date of the Reinsurance Agreement.

Thereafter, on or about March 14, 1975, Protective Life Insurance Company granted another extension of the deadline

EXHIBIT "F"

pursuant to the terms of its letter of that date addressed to the Honorable Charles H. Payne, Receiver, Empire Life Insurance Company of America.

Thereafter, on March 28, 1975, the deadlines were again extended by Protective Life Insurance Company by letter dated that date addressed to the said Honorable Charles H. Payne.

On March 26, 1975, the Receiver for Empire in the State of Alabama filed a Petition for Order Approving Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance.

Thereafter, under date of April 10, 1975, Judge Barber signed a Memorandum Opinion and Decree approving the Petition of the Receiver for approval of the Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance". A copy of that Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance is annexed hereto marked Exhibit "AA".

At the prior hearing before this Honorable Court, Mr. Thomas K. Pennington, Vice President and actuary of Protective Life Insurance Company, testified to the effect that he knew of no material adverse change in the financial condition of Empire Life Insurance Company of America which would necessitate any increase in the moratorium and that the moratorium would not be increased by more than 3% on account of the Old National policies. At the time of such testimony, Protective Life Insurance Company was fully aware of the matters stated in 2 a and b of the said Agreement To Effectuate the prior Reinsurance Agreement and was fully aware of the fact that there was a serious question about the assignability

of interest in insurance policies upon the life of Shearn Moody, Jr. These three matters in 2 a, b, and c of the said Agreement to Effectuate the prior Reinsurance Agreement are the reasons attributed to the increase in the moratorium to 50%.

I, as an attorney for Defendant Moody, have received no notice of any motion by Mr. Herbert Crook, Ancillary Receiver for Empire Life Insurance Company of America, for approval by this Honorable Court of the aforementioned "Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance". It is my opinion that such approval is required under the provisions of the Insurance Code of the State of Texas prior to any action on the part of the said Ancillary Receiver to Consummate or Effect the said Agreement.

FRANK G. NEWMAN

SUBSCRIBED AND SWORN to before me on this the 25th day of July, 1975.

MARGARET DAY

Notary Public in and for Dallas
County, Texas

[Exhibit "AA" Omitted]

APPENDIX I

AGREEMENT TO EFFECTUATE TREATY OF ASSUMPTION AND BULK REINSURANCE

Charles H. Payne, Commissioner of Insurance, State of Alabama, (herein "Receiver") in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), Herbert Crook, Ancillary Receiver of Empire for the State of Texas (herein "Ancillary Receiver"), and Protective Life Insurance Company, Birmingham, Alabama, an Alabama corporation (herein "Protective") hereby enter into the following Agreement (herein "Agreement to Effectuate Treaty") in order to effectuate the Treaty of Assumption and Bulk Reinsurance dated May 31, 1974, as four times amended (herein "Agreement").

1. As used herein, the following terms shall have the meanings set out below and none other:

(a) Words and terms dened in the Agreement shall have the same definition and meaning herein.

(b) "Lawsuits" shall mean those three lawsuits or actions described in paragraph 2 hereof.

(c) "Trust" shall mean Empire's (or the Receiver's or Ancillary Receiver's) entire interest in the Libbie Shearn Moody Trust as described in paragraph VII(C)(5) of the Agreement.

(d) "Insurance Policies" shall mean each and all of those certain insurance policies described in paragraph VII(C)(5) (iii) of the Agreement.

2. Pursuant to paragraph 6 of the Second Amendment, the Receiver and Protective have evaluated changes in the condition of Empire occurring after February 1, 1974, and have deter-

mined that the condition of Empire has changed adversely from said date so as to justify an increase in the Moratorium Amount. The Ancillary Receiver concurs in such determination. Specifically, since February 1, 1974, the following has developed:

a. On or about February 11, 1974, Shearn Moody, Jr., filed an action against the Moody National Bank of Galveston and Empire in the District Court of Galveston County, Texas, 122nd Judicial District, No. 122,034, in which Moody sought a declaration that Empire's interest in the Trust could not be transferred to Protective pursuant to the Agreement. Though a judgment was entered by the trial court denying Moody's claim, an appeal from this judgment has been taken by Moody to the Texas Court of Civil Appeals.

b. On January 14, 1975, Scott E. Manley, as attorney for Moody, made demand on Gene D. Wyatt, President of the Moody National Bank which is Trustee of the Trust, to interplead all Trust income due to Empire into the Ancillary Receivership court in Texas. The Moody National Bank as Trustee immediately acceded to the demand of Moody's attorney and filed a Stakeholder's Petition in Intervention in the Ancillary Receivership action (Case No. 198,374 in the District Court of Travis County, Texas, 53rd Judicial District) depositing therein approximately \$117,000 which is the most recent semi-annual distribution from the Trustee to Empire. No judgment has been entered in said proceeding on said Stakeholder's Petition. As a result, Empire is not receiving the current income from the Trust.

e. On or about February 21, 1975, Shearn Moody, Jr. moved to file a Cross-Claim and Third Party Petition in the

Ancillary Receivership action in which he claimed that (a) under Texas law, Protective had no insurable interest in Moody's life, (b) the proceeds of the Insurance Policies held by Empire which secure the value of the Trust could not be assigned to Protective without Moody's express written consent, and (c) any such attempted assignment would be void. No judgment has been entered in said proceeding on said Cross-Claim and Third Party Petition. The Insurance Policies are an essential prerequisite of the Trust's having any value on the balance sheet of an insurance company, because if Shearn Moody were to die, the Trust which constitutes a life interest only, would be terminated.

3. As a result of these Lawsuits, the Receiver and Ancillary Receiver acknowledge that so long as they are pending, (a) the Receiver cannot transfer clear title to the Trust as required by the Agreement; (b) the Trust cannot be carried as an admitted asset in any amount on the statutory balance sheet of Empire, or of Protective if transferred to Protective; and (c) the admitted assets of Empire have been reduced by \$4,367,000. This reduction in the value of Empire's admitted assets is a "change . . . in the value or nature of Empire's assets" within the meaning of paragraph 6 of the Second Amendment, and Protective and the Receiver agree that the initial Moratorium Amount shall be increased by approximately twelve percent (12%) of the Withdrawable Funds as a result of this change.

4. No assets will be transferred at this time to Protective with respect to the reinsurance of the Old National policies, and therefore the initial Moratorium Amount is due to be increased pursuant to paragraph 7 of the Second Amendment. Protective and the Receiver agree that the amount of the increase as a

result of the failure of any assets to be transferred to Protective with respect to the reinsurance of Old National policies shall be approximately three percent (3%) of the Withdrawable Funds.

5. In accordance with the foregoing, pursuant to paragraphs 6 and 7 of the Second Amendment and at the request of the Receiver and Ancillary Receiver, the initial Moratorium Amount under the Agreement for all Assumed Policies and separate accounts shall be adjusted to fifty percent (50%) of the Withdrawable Funds as of September 15, 1972 except that with reference to (a) the United Founders Treaty the initial Moratorium Amount shall be fifty percent (50%) of the Net Reserves under the Treaty as of said date, and (b) separate accounts specified in paragraph VIII (A) (2) of the Agreement the initial Moratorium Amount shall be fifty percent (50%) of the total value of those accounts as of said date.

6. As the increase in the Moratorium Amount pursuant to paragraph 6 is based on the existence of the Lawsuits, upon Final Judgments being rendered in each and all of the Lawsuits which establish without qualification that:

(a) Empire's entire interest in the Trust, as described in the Agreement, may be validly, lawfully, and irrevocably assigned to Protective free and clear of any lawful or equitable claim or restrictions, and

(b) the Receiver may lawfully assign to Protective, absolutely and irrevocably, the right to receive death proceeds from the Insurance Policies in the amount of \$4,350,000 (or an adjusted amount in accordance with the Agreement, as amended),

as of the end of that month in which (i) the last of such Final

Judgments is rendered or (ii) death proceeds in the amount of \$4,250,000 from the Insurance Policies are received by Protective, free and clear of any adverse claim, whichever is earlier, the outstanding Moratorium Amount on each Assumed Policy and separate account in force shall be judged by twenty-four per cent of the initial Moratorium Amount for such policy or account except that for policies which convert to reduced paid-up or extended term status after June 24, 1974, such reduction shall be twelve percent (12%) of the initial Moratorium Amount. Such moratorium reduction shall be effective as of the first of the next succeeding month. As used herein, "Final Judgment" means the final judgment, order, decree or mandate of the highest appellate court (except the United States Supreme Court) to which an appeal may be taken or other recourse had by right or discretion of court, by petition or similar pleading, in any of the Lawsuits.

7. The Receiver for Old National has filed a claim against the Receiver for Empire in the amount of \$800,000 which the Old National Receiver shall assign to Protective for the benefit of the Empire Fund, and which claim the Receiver has reviewed and determined to be a valid and just claim and the Receiver agrees to recommend to the Court that said claim be allowed in full (subject to verification as to amount) on the condition that any and all payments or distributions made on account of said claim (which shall be in the same proportionate share as payments or distributions to other creditors) be immediately credited to the Empire Fund. As of the end of the month in which the first such payment or distribution on account of said claim is received by Protective it shall calculate the reduction in the Moratorium Amount in accordance with paragraph VII.D. of the

Agreement, as amended, using approximations for values not readily available except at year end and treating such payment or distribution as an Empire Asset. Such moratorium reduction shall be effective as of the first of the next succeeding month.

8. Notwithstanding the Lawsuits, at closing, the Receiver shall transfer, assign and convey to Protective all of Empire's (or the Receiver's) right, title and interest to and in the Trust and with respect to the Insurance Policies shall do all things required of the Receiver by the Agreement, including, without limitation, paragraph 4 of the First Amendment.

9. If for any reason any court of competent jurisdiction determines that the Trust cannot be unconditionally and irrevocably transferred, assigned and conveyed to Protective, or invalidates or rescinds, in whole or in part, such transfer, and ownership of said Trust reverts to the Receiver (or the Ancillary Receiver), the Receiver and Ancillary Receiver each severally covenants and agrees to and shall transfer, assign and pay to Protective, immediately upon receipt thereof, free and clear of all claims of any and all creditors and of all expenses of administration, all income received by the Receiver or Ancillary Receiver on account of said Trust. If for any reason any court of competent jurisdiction determines that the death proceeds of the Insurance Policies cannot be assigned directly to Protective as contemplated by the Agreement, as amended, the Receiver and Ancillary Receiver each severally covenants and agrees to and shall transfer, assign and pay to Protective, immediately upon receipt thereof, free and clear of all claims of any and all creditors and of all expenses of administration, \$4,350,000 of such proceeds, or such other amount as may be computed pursuant to paragraph 4(D)(3) of the First Amend-

ment to the Agreement. The Receiver and Ancillary Receiver specifically agree that the respective receiverships shall remain open for an indefinite period, and as long as may be required, so that all of said income and death proceeds may be transferred and assigned to Protective as and when received by the Receiver or Ancillary Receiver. Any and all transfers and assignments to be made pursuant to this paragraph shall be absolute and unconditional, irrespective of any right of set-off, recoupment or counterclaim the Receiver or any ancillary receiver may claim against Protective.

10. The Receiver and the Ancillary Receiver will each do all things reasonably within his power to procure as promptly as possible an unqualified victory in each of the Lawsuits and in any other lawsuits which might affect, directly or indirectly, the Trust, the Insurance or the Agreement. The Receiver and Ancillary Receiver will cooperate fully with Protective in the conduct of the Lawsuits and such other lawsuits and will not enter into any settlement negotiations nor settlement agreement respecting any of such Lawsuits without the express written approval of Protective.

11. The effective date of the Agreement shall be January 1, 1975, provided that the Receiver transfers all of the assets and policies due to be transferred to Protective pursuant to the Agreement and this Agreement to Effectuate Treaty and meets all of the conditions of the Agreement, as amended (except those relating to the Trust and the Insurance), on or before April 10, 1975. If the Receiver is unable to make said transfer of all of the assets and policies and meet all of said conditions on or before April 10, 1975, the Effective Date shall be the first day

of the month in which said transfer is complete and all of said conditions satisfied, or such earlier date as may be fixed by Protective.

12. It is expressly understood and agreed that Protective's agreement to reinsure as provided herein is made in consideration of the covenants and agreements of the Receiver and Ancillary Receiver made herein, and specifically, but without limitation, the adjustment to the Moratorium Amount made pursuant to paragraph 6 of the Second Amendment, and that without all of the covenants and agreements of the Receiver and Ancillary Receiver contained herein Protective would not reinsure the Assumed Policies pursuant to the Agreement, if at all, until all of the conditions of the Agreement, as amended, were met.

13. The Receiver expressly acknowledges that Protective has the right under the Agreement to file a claim against the Empire receivership estate on behalf of all policyholders against whose policies and contracts any moratoriums have been placed in the amount of the total amount of all such moratoriums. The Receiver further acknowledges that such a claim, when filed, will be a valid and just claim and that the Receiver will recommend that it be allowed in full (subject to verification that it is correct as to amount) and paid, provided that such payment shall be made after payment has been made to other creditors, whose claims are allowed, in proportion to the Benefits accorded policyholders under this Agreement as amended and as herein effectuated and that such payment shall not unlawfully discriminate against other creditors whose claims are allowed.

14. This Agreement to Effectuate Treaty is subject to approval of the Court. The Closing Date shall be two days following the

date on which this Agreement to Effectuate Treaty may be approved by the Court. Closing shall take place at 10:00 A.M. in the Board of Directors room of Protective.

15. Any and all disputes or differences between the contracting parties arising under or relating to this Agreement to Effectuate Treaty shall be submitted to arbitration in accordance with paragraph XVII of the Agreement. Said paragraph XVII is specifically incorporated herein just as if retyped and set out fully herein.

16. This Agreement to Effectuate Treaty shall inure to the benefit of and be binding upon the successors and assigns of Protective and the Receiver and the Ancillary Receiver.

17. All prior or contemporaneous agreements and representations relating to effectuation of the Agreement are merged into this Agreement to Effectuate Treaty, which, together with the Agreement, constitutes the entire contract between the parties. No amendment or modification hereof shall be of any force or effect unless in writing and signed by the parties.

18. This Agreement to Effectuate Treaty shall be governed by and construed and enforced in accordance with the laws of the State of Alabama, except that it is agreed that the provisions of paragraph 15 hereof, relating to arbitration of disputes hereunder, shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.*

19. Nothing herein, express or implied, is intended, or shall be construed, to confer upon or given any person, firm or corporation, other than Protective, Empire and the Receiver and the Ancillary Receiver, any rights or remedies under or by reason of this Agreement to Effectuate Treaty.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of this . . . day of April, 1975.

CHARLES H. PAYNE

Charles H. Payne, as Receiver for
Empire Life Insurance Company of
America

ATTEST:

W. C. Brannon
Secretary

PROTECTIVE LIFE INSURANCE COMPANY

Wm. J. Rushton
President

The undersigned Ancillary Receiver, on behalf of him and his successors, concurs in all of the agreements and covenants contained in paragraphs 9 and 10 hereof and shall otherwise be bound hereunder in accordance with the provisions hereof.

HERBERT CROOK

Herbert Crook, Ancillary Receiver
for Empire Life Insurance Company
of America, State of Texas

NOV 18 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. **77-571**

SHEARN MOODY, JR.,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME
JUDICIAL DISTRICT OF TEXAS**

SHANNON H. RATLIFF
McGINNIS, LOCHRIDGE and KILGORE
Texas State Bank Building
900 Congress Avenue
Austin, Texas 78701

Attorneys for Respondent, Herbert Crook,
Ancillary Receiver of Empire Life Insurance Company of America

DRAYTON NABERS, JR.
CABANISS, JOHNSTON, GARDNER, DUMAS &
O'NEAL

1900 First National-Southern Natural
Building
Birmingham, Alabama 35203

Attorneys for Protective Life Insurance
Company



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

SHEARN MOODY, JR.,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME
JUDICIAL DISTRICT OF TEXAS**

STATEMENT OF THE CASE

A brief review of the facts, most of which are candidly recited in the Petition at pp. 5-6. will show that the judgment entered by the trial court is completely unassailable.

This action was commenced by the Moody National Bank of Galveston, Texas, by filing a bill in interpleader in the 53rd Judicial District Court of Travis County, Texas. The interpleader action was filed after Shearn Moody, Jr. demanded that the bank not pay a semi-annual income dividend from $\frac{3}{8}$ ths of a $\frac{1}{8}$ th interest in the Libbie Shearn Moody Trust. The interest in the foregoing trust had been assigned by Moody to the

Empire Life Insurance Company of America ("Empire"), and had subsequently been assigned by the Receiver of Empire, pursuant to the terms of a reinsurance treaty, to Protective Life Insurance Company of Birmingham, Alabama ("Protective").* As Empire was an Alabama corporation, the domiciliary receiver for Empire was appointed in Alabama. The trial court below had appointed respondent Herbert Crook as ancillary receiver for Empire in Texas. Protective intervened. Moody claimed in the interpleader action below that when he assigned the trust interest to Empire, he had done so in such a manner as to prevent Empire from further transferring the interest to any other party, such as Protective. The sole issue presented in the interpleader action, therefore, was whether the Empire Receiver had authority to transfer the trust interest to Protective.

That precise issue had already been litigated by the Empire Receiver and Moody in a declaratory judgment action filed by Moody in the 122nd Judicial District Court of Galveston County, Texas, in which Moody sought a declaration that the Empire Receiver did not have the right or power to assign the trust to any third party. The trial court granted summary judgment for the Empire Receiver, holding that the Empire Receiver had an unfettered right to transfer the trust interest to any third party. Moody appealed that judgment, and it was during the pendency of that appeal that Moody made demand on the Moody National Bank that it not pay the trust income to Protective, and the bank interpleaded the trust income in the action below. In the "Response of Shearn Moody, Jr. to Motion for Summary Judgment," below, Moody admitted that the issue in the Galveston case and this one were identical, and conceded that a final judgment in the Galveston case would be *res judicata* in this one (Appendix A attached hereto).

* For a development of the facts relating to the Empire receivership and the reinsurance treaty, see pp. 3-12 of Brief in Opposition to Petition for Writ of Certiorari filed contemporaneously with this brief in Case No. 77-428.

Subsequently, the Texas Court of Civil Appeals affirmed the summary judgment granted by the Galveston trial court, and the judgment became final when the Texas Supreme Court denied review of the decision of the Court of Civil Appeals. *Moody v. Moody National Bank of Galveston, et al.*, 522 S.W. 2d 710 (1975, writ ref'd n.r.e.). Specifically, the Court of Appeals held:

The trial judge correctly held that as a matter of law, the plaintiff assigned and transferred to Empire full and complete title and interest to two-fifths of [Moody's] right to receive during his lifetime an undivided one-eighth of the income from the Libbie Shearn Moody Trust and that Empire acquired the absolute and unconditional power to transfer, assign and convey all or any part thereof without the permission of the plaintiff or the trustee.

522 S.W.2d at 710.

On the basis of the judgment in the Galveston case, as affirmed by the Texas Court of Civil Appeals, the Travis County court, the trial court below, ordered that the trust income interpleaded be paid to the Texas Receiver for transmission to Protective under the terms of the reinsurance treaty.

Faced with the conclusive adjudication against him in the Galveston case, Moody sought to create a phantom issue in the interpleader action then pending in the trial court below. This phantom issue was whether the Texas ancillary receivership court had properly approved an amendment to the reinsurance agreement between Protective and the Empire Receiver without a plenary hearing. This amendment ("Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance" set forth at Petr's App. A-23-32) had nothing to do with anyone's entitlement to the interpleaded funds. It had nothing to do with the assignment of the trust interest to Protective. It concerned solely the rights of Empire policyholders under the reinsurance agreement with Protective.

ARGUMENT

I. The Decision Below Was Clearly Correct, and the Petition Should Be Dismissed.

Moody was never an Empire policyholder. The Agreement to Effectuate did not affect his rights and interests in any way. Thus, the appellate court below quite correctly held that Moody did not have standing to complain of the Agreement to Effectuate. In making this ruling, the Court of Appeals stated in *dictum* that the record did not disclose that Moody was a stockholder of Empire. Whether this observation of the Court of Appeals was accurate as a matter of fact is wholly immaterial to the correctness of the judgment of the trial court or its affirmation by the Court of Appeals. The Agreement to Effectuate did not affect the rights of Empire stockholders in any way. The sole issue presented by the bill in interpleader below was whether the Receiver had the right to assign the trust interest to Protective, and this issue had been conclusively decided against Moody in the Galveston case. Under the doctrine of *res judicata*, which Moody conceded was applicable in this case, the trial court properly granted summary judgment for the Receiver and Protective.

Accordingly, the sole reason asserted by Petitioner for granting the writ requested is of no significance at all. It does not help Petitioner to claim that he is an Empire stockholder and his status as such was ignored by the Texas trial court, the Court of Civil Appeals, and the Texas Supreme Court. There is no reason why Moody's claimed status as a stockholder should not have been ignored by the courts of Texas, as it was totally immaterial to the case presented to those courts.

The additional review that Moody seeks in this Court of this irrelevant, sham issue which is unlikely to recur and is of no interest to anyone other than the parties before this Court should be denied.

CONCLUSION

For the foregoing reasons, the petition is due to be denied.

Respectfully submitted,

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Proof of Service

Proof of service of three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari upon all parties separately represented by counsel was filed by Drayton Nabers, Jr., a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.

APPENDIX

— A-1 —

No. 198,374

The State of Texas

vs.

Empire Life Insurance Company
of America, et al.

In the District Court
of Travis County, Texas
53rd District

RESPONSE OF SHEARN MOODY, JR. TO MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes Now Defendant, Shearn Moody, Jr., and files this his Response to Motion for Summary Judgment of the Ancillary Receiver of Empire Life Insurance Company of America, and Protective Life Insurance Company, Intervenor, and as grounds therefor, would respectfully show the Court as follows:

I

Prior Suit Is on Appeal and Is Not Res Judicata

The Ancillary Receiver and Protective assert that the judgment in the case, Shearn Moody, Jr. v. Moody National Bank of Galveston, et al., No. 112,034 in the 122nd District Court of Galveston County, Texas rendered on November 27, 1974, affirmed by the 14th Civil Court of Appeals in Houston on April 23, 1975, is res judicata as to the question raised by the Moody National Bank of Galveston's interpleader of funds received by it under the Libbie Shearn Moody Trust, and as to the right of Empire to transfer and assign the Libbie Shearn Moody Trust interest in the hands of Empire to Protective Life Insurance Company. The issues in that action are identical to the issues involved here. The question there, as here, is whether

Empire has an unfettered right to reassign the Trust interest and the income therefrom. Moody asserted two claims: (1) claim for a declaratory judgment, declaring that Moody's assignment of $\frac{2}{3}$ of $\frac{1}{8}$ life estate interest in the Libbie Shearn Moody Trust to Empire Life Insurance Company of America was to Empire alone and not to its successors or assigns, and that the interest could be assigned under the terms of the modified spendthrift trust and the assignment only with the consent of Moody and the Trustee, Moody National Bank of Galveston, and (2) an action for reformation, that if the assignment conveyed such an unfettered right to reassign then it was based on mutual mistake. A copy of Plaintiff's Amended Petition in that case is attached as Exhibit "A" to Moody's Plea in Abatement and incorporated by reference herein.

Indeed, not only are the issues in the two cases the same, and except for Protective, the parties are the same, Empire has moved for a summary judgment in this action on the identical grounds that Empire moved for a summary judgment in the other case. As there, Empire asserts that a judgment of September 20, 1959 by the 56th Judicial District Court of Galveston, Texas in Cause No. 87,263 styled "Moody National Bank of Galveston v. W. L. Moody, III et al." is res judicata as to the ability of Empire to reassign its interest assigned to it in 1963. (Apparently this position was rejected by the Galveston District Court and the 14th Civil Court of Appeals since neither the judgment or opinion makes mention of this issue.) As there, Empire asserts that Moody is estopped by certain alleged declarations from claiming that the interest assigned to Empire was not freely transferable. (In this regard it is interesting to note that the 14th Civil Court of Appeals stated at page 5 of its opinion, "At no time was the Trust interest which had been conveyed to him ever assigned by Empire to any other party".) In that case as here, Empire asserts that the 1963 assignment was unambiguous on its face and as a matter of law gave Empire the unfettered right to

reassign that interest. (The 14th Civil Court of Appeals upheld this position, even though certain ambiguities existed on the face of the documents and even though Moody's First Amended Petition contained a claim for reformation based on mutual mistake if the documents were deemed to be unambiguous.)

However, the Ancillary Receiver and Protective have neglected to point out that an Application for Writ of Error to the Supreme Court of Texas has been timely filed by Moody in the above mentioned case. A certified copy of that Application for Writ of Error is attached as Exhibit "C" to Moody's Plea in Abatement and incorporated by reference herein. A certificate of Garson R. Jackson, Clerk of the Texas Supreme Court, certifying that the Application for Writ of Error was filed in the Texas Supreme Court on June 17, 1975 and is still pending, as of July 14, 1975, before the Texas Supreme Court is attached hereto as Exhibit "C" incorporated by reference herein. Additionally, the certified copy of the judgment of the 14th Court of Civil Appeals in Houston is attached hereto along with the certificate of the Clerk in the 14th Court of Civil Appeals in Houston, certifying that Moody's Application for Writ of Error was timely filed with that Court on June 13, 1975, that the entire record of the cause was sent to the Clerk of the Supreme Court, that the Clerk of the Supreme Court has mailed a receipt to the Court of Appeals Clerk reflecting that the Application for Writ of Error was filed in the Texas Supreme Court on June 17, 1975, and that the case has not been returned to the 14th Court of Appeals as of July 16, 1975.

Accordingly, it is abundantly clear that proceedings are still pending in the case which the Ancillary Receiver and Protective ask to be given res judicata effect in this matter. Moody's Application for Writ of Error is still pending before the Texas Supreme Court. Consequently, Moody would show that as a

matter of Texas law, the aforementioned action is not, and cannot be res judicata of the identical issues involved in Empire's Motion for Summary Judgment until the judgment in the other case is final and all appeals have been exhausted. Under Texas law, this is not, and cannot be the case until Moody's Application for Writ of Error, now pending in the Supreme Court of Texas, is acted upon one way or the other by that Court.

[Subsequent parts of Response omitted]